

Submission
on the National Interest Analysis
of the
Convention on the Rights of Persons with Disabilities

To: Secretary
Joint Standing Committee on Treaties
House of Representatives
Parliament House
Canberra ACT 2600
(submitted electronically to: jsct@aph.gov.au)

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Summary

The NIA documents include several interpretations of CRPD Articles that are contrary to both the letter and the spirit of the CRPD. Furthermore, these interpretations are clearly incompatible with the object and purpose of the CRPD, which is prohibited by Article 46 and will therefore likely be challenged if Australia makes such declarations when it ratifies.

Therefore, a second issue that this submission highlights is that if these interpretations in the NIA documents become declarations when Australia ratifies, such action will damage Australia's reputation at the UN and with the global disability community.

The submission has three sections, followed by appendices of three documents supporting the submission and a brief biographical note on the author relevant to the submission.

- 1. Context - Some Key Principles of the Object and Purpose of the CRPD**
- 2. Erroneous Interpretations of the CRPD in the NIA**
- 3. Political Consequences of a Declaration on Article 12**

Appendices

A – IDA Position Paper on the CRPD

B – IDA Principles for Implementation of CRPD Article 12

C – Gerard Quinn on Reservations/Declarations (Mexico October 2007)

D – Brief biographical note on David Webb

1. Context - Some Key Principles of the Object and Purpose of the CRPD

This submission focuses on three of the key principles of the Convention on the Rights of Persons with Disabilities (CRPD) that go to the heart of its object and purpose. These are:

- the prohibition against any form of discrimination on the basis of disability
- that people with disabilities enjoy legal capacity on an equal basis with others in all aspects of life
- that supported, rather than substituted, decision-making is the only model endorsed for assisting people with disabilities whenever assistance might be required

On the day that the UN General Assembly adopted the CRPD it was hailed by the then Secretary General, Kofi Annan, as a “new era” for people with disabilities. Others have described it as a “paradigm shift” in how societies must now think about people with disabilities.

At the heart of this paradigm shift is the underlying principle throughout the CRPD that prohibits any discrimination on the basis of disability. This is made explicit in Article 12 which recognises that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”, making Article 12 fundamental to the basic object and purpose of the CRPD. A further underlying principle throughout the CRPD, and which also lies at the heart of the paradigm shift it represents, is that it is *only* supported decision-making, never substituted decision-making, that is endorsed as the model for assisting people to exercise their legal capacity whenever assistance might be required.

These fundamental and groundbreaking principles of the CRPD came about largely because of the extensive participation in the CRPD negotiations of people with disabilities themselves and their representative Disabled Peoples Organisations (DPOs). Indeed the CRPD now stands as a landmark and a model for how civil society can participate in the development of such human rights instruments in the 21st century. As a consensus document endorsed by the international disability community, the CRPD represents not only new international law but also the voice of people with disabilities worldwide and thus speaks with great moral authority.

The International Disability Alliance (IDA) is an alliance of eight international DPOs that played a key role in the CRPD negotiations to establish the fundamental principles outlined above, which have the overwhelming endorsement of people with disabilities around the world. In particular, the critical importance of the recognition of legal capacity and of supported, not substituted, decision-making can be summed up by quoting Lex Grandia, president of the World Federation of the DeafBlind and the current Chair of the IDA. On legal capacity, Lex has said, “We should not have to go to court to get our legal capacity back.” And on supported decision-making he has said “that only supported decision-making is meant and regulated in the convention and that substituted decision-making is out”.

Two of the appendices in this submission come from the IDA and reinforce these (and other) key principles of the CRPD. Appendix A is an IDA Position Paper on the CRPD and some other, related human rights instruments. Appendix B comes out of an IDA CRPD forum to establish some consensus Principles for Implementation of CRPD Article 12.

2. Erroneous Interpretations of the CRPD in the NIA

The NIA documents include numerous statements of interpretation of CRPD Articles, some of which are said to be under consideration for being lodged as declarations when Australia ratifies. Of particular concern is the interpretation of Article 12, though brief mention must also be made of the interpretation of Article 17.

Paragraph 17 of the NIA Summary document asserts that “Article 12 does not prohibit substituted decision-making” and that “Article 17 does not prohibit compulsory treatment”, both of which are also asserted elsewhere in the NIA documents. This submission disputes both these interpretations for reasons given in this section. The following section then analyses the likely political consequences of the NIA’s interpretation of Article 12 should it become a ratification declaration.

Article 12 and Substituted Decision-Making

Article 12 is universally recognised as fundamental to the object and purpose of the CRPD so that any reservation or declaration that limits or dilutes its meaning will likely be challenged under Article 46 as incompatible with the object and purpose of the CRPD. This is examined further in the following section of this submission. This section shows that the NIA’s interpretation of Article 12 is a radical distortion of its meaning that undermines the very foundations of the CRPD.

First, it is a peculiar argument to claim that something is permitted because it is not explicitly prohibited without any other rationale for such an assertion. It is also peculiar in the context of the CRPD to suggest the status quo as a justification for substituted decision-making given that the CRPD quite deliberately challenges status quo assumptions about how we think about and respond to disability. In particular, the CRPD challenges the status quo of paternalistic attitudes towards people with disabilities, of which substituted decision-making is one of the most disturbing examples for people with disabilities.

But more than this, the assertion that Article 12 does not prohibit substituted decision-making and is therefore endorsed by the CRPD represents a serious misreading of the CRPD. As pointed out in the previous section, it is *only* supported decision-making that is *ever* endorsed throughout the entire CRPD. While Article 12 certainly represents a major element of the supported decision-making model, any interpretation of Article 12 on this question must be made in the context of the entire CRPD. When this is done, and at the risk of being repetitive, it is *only* supported decision-making that is *ever* endorsed in the CRPD, with substituted decision-making *never* mentioned, far less endorsed.

The only argument I have ever heard that uses the actual text of the CRPD to try and justify substituted decision-making is the claim that the discussion of safeguards in Article 12 (4) is an *implicit* recognition, and therefore an endorsement, of substituted decision-making. This argument claims that safeguards are only necessary when substituted decision-making is permitted so that the reference to them in Article 12 (4) *implies* that substituted decision-making is allowed and endorsed by the CRPD.

This is another serious misreading of Article 12 and of the CRPD. It also reveals a failure of understanding of the supported decision-making model that is so central to the CRPD’s

guarantee of legal capacity for people with disabilities on an equal basis with others. Advocates of substituted decision-making claim that it is necessary for at least some “rare end extreme” situations and give the case of a person in a coma as an example. But the supported decision-making model works even in such extreme cases, though without compromising the person’s legal capacity. Supported decision-making says that every effort must be made to ascertain and respect the wishes of the person even if that person is unable to communicate their wishes at all, such as when in a coma. This is sometimes referred to as “100% support”. The substituted decision-making model, which represents a major limitation of a fundamental human right and has a long history of being very prone to abuse, is simply unnecessary.

Another reason that interpreting the mention of safeguards as permitting substituted decision-making is a misreading of the CRPD as well as a misunderstanding of supported decision-making is because supported decision-making *also* requires safeguards. Supported decision-making does not by itself guarantee that abuses won’t occur. Of course safeguards are needed. But this in no way implies that Article 12 permits or endorses substituted decision-making. On the contrary, the basic principles of legal capacity, in conjunction with a wider reading of the rest of the CRPD, makes it clear that the CRPD does *not* permit or endorse substituted decision-making.

So to interpret Article 12 as permitting substituted decision-making simply because it does not explicitly prohibit it, is indeed a peculiar interpretation. It is also an interpretation that significantly dilutes one of the major Articles that underpins the object and purpose of the CRPD so that, should it become a ratification declaration, it is likely to be challenged in international human rights forums as a breach of Article 46, as discussed below.

The NIA interpretation of Article 12 that it does not prohibit substituted decision-making is a misreading of Article 12, including a failure to read it in the wider context of the entire CRPD, plus a serious misunderstanding of the supported decision-making model, which is the only model permitted and endorsed by the CRPD. It should not be contemplated any further as a ratification declaration.

Article 17 and Compulsory Treatment

The assertion in the NIA documents that “Article 17 does not prohibit compulsory treatment” is another peculiar interpretation based on another serious misreading of the CRPD.

Article 17 is a short, simple and quite general statement of the right for a person’s physical and mental integrity to be protected. It does not specifically address medical treatment. For this we need to look at Article 25 on health where in Article 25 (d) it states that health care for people with disabilities is to be provided “on the basis of free and informed consent”. That is, it explicitly reinforces that the legal capacity asserted in Article 12 applies to the specific issue of health care of people with disabilities *on an equal basis with others in all aspects of life*. It cannot be more explicit. People with disabilities have the right to refuse unwanted medical treatment on the same basis as all other citizens.

Article 17 is relevant to this issue only to the extent that unwanted medical treatment is just one of many possible examples of a person’s physical and mental integrity not being

respected. But the relevant article that specifically addresses compulsory treatment is Article 25, which makes it very clear that it is *not* permitted.

The NIA interpretation of Article 17 that it does not prohibit compulsory is simply a gross error that should never have occurred and should not be contemplated any further as a ratification declaration.

3. Political Consequences of a Declaration on Article 12

From the previous sections, it is apparent that Australia will quite likely encounter some difficult political (perhaps diplomatic is better word) problems if it proceeds with some of the declarations proposed in the NIA documents. This is especially true for the interpretation of Article 12, which seriously undermines the basic object and purpose of the CRPD. The interpretation of Article 17 is also serious but would probably be more of an embarrassment than anything else because of its obvious flaws.

Appendix C is the transcript of a presentation delivered by Gerard Quinn to the Human Rights Commission of Mexico in Mexico City in October, 2007. Quinn is a highly regarded expert in international human rights law and speaks with great authority on matters such as the meaning and validity of any reservations or declarations that a country makes when it ratifies an international human rights convention, such as the CRPD.

Quinn's presentation in Mexico is particularly relevant to this submission as it addresses the controversy Mexico is currently experiencing as a consequence of its declaration on Article 12 when it signed the CRPD. This controversy, which still continues to generate much heated debate, will likely come Australia's way too if it chooses to ratify with a similarly inappropriate declaration on Article 12.

Quinn first highlights that the CRPD "is the most eloquent refutation of paternalism I can imagine in the disability field" and that "the whole point of the convention is to bring about change" rather than preserve the status quo, noting that in his view, "we are all developing countries when it comes to disability". My own assessment of Australia's NIA is that it indicates a paternalistic defence of the status quo in Australia rather than any genuine commitment to the real changes that the CRPD calls for. And I know that this assessment is shared by many disability colleagues around the world who have seen the NIA documents and are alarmed by what they contain.

Quinn then observes that "There is, however a substantial and growing body of opinion to the effect that reservations should never be allowed in human rights instruments" and warns against any "Balkanisation of the convention norms". This is explained fully in his paper in Appendix C.

On the key issue raised in this submission, Quinn notes that "The intent of Article 12 ... sits at the very heart of the convention". He goes on to say that, "a reservation to Article 12.2 that took away from these core premises would indeed be inconsistent with the 'object and purpose' of the convention since *Article 12.2 encapsulates the very essence of the convention*. It goes to the heart of treating persons as subjects and not as objects" (my italics).

I encourage the reader to read the full text of Quinn’s paper in Appendix C. The quotes above are sufficient, however, to show that if Australia attempts to ratify with a declaration on Article 12 such as the one proposed in the NIA, then it will be seen as very controversial and deeply disturbing to global disability community. It is also likely (probably inevitable) that the disability community, supported by international human rights legal experts such as Quinn, would mount a determined campaign, as is currently happening in Mexico, to challenge such a declaration if it was made.

The NIA’s proposed declaration on Article 12 radically dilutes the fundamental object and purpose of the CRPD, which is a violation of Article 46.

So there is another consideration for the Australian government as it contemplates any declaration on Article 12. Any such action would be seen by the global disability community as a betrayal of people with disabilities by the Australian government. And international human rights legal experts such as Quinn would question not only the validity but also the intent, and indeed the morality, of such a declaration.

Furthermore, any attempt by Australia to dilute Article 12 in order to preserve the status quo of substituted decision-making would reinforce, indeed exacerbate, Australia’s current low standing at the UN. After more than a decade of the pro-Bush, anti-UN Howard government, Australia is currently already perceived as paternalistic, even “neo-colonial”, in its attitude toward the UN family of nations. With the recent change of government in Australia, the new Prime Minister, Kevin Rudd, has made some bold rhetorical statements, both here and overseas, that Australia wishes to rebuild its relationship with the UN, which I wholeheartedly support. But rhetoric alone will not be sufficient to repair the damage of the Howard legacy. On the contrary, paternalistic, status quo declarations that undermine the fundamental object and purpose of this bold new Convention – the first new international human rights law of the 21st century – will expose the Prime Minister’s rhetoric as empty and meaningless.

If Australia ratifies the CRPD with any major declarations, such as the one proposed in the NIA on Article 12, then it would be a major setback for Australia’s relationship with not only the global disability community but also for its efforts to rebuild Australia’s relationship with the UN.

Appendix A – IDA Position Paper on the CRPD

IDA INTERNATIONAL DISABILITY ALLIANCE

Member organizations:

Disabled Peoples' International, Inclusion International,
International Federation of Hard of Hearing People,
Rehabilitation International, World Blind Union,
World Federation of the Deaf, World Federation of the DeafBlind,
World Network of Users and Survivors of Psychiatry
European Disability Forum
Arab Organization of Disabled People

Date: April 25, 2008

Position Paper on the Convention on the Rights of Persons with Disabilities (CRPD) and Other Instruments

Introduction

The International Disability Alliance upholds the Convention on the Rights of Persons with Disabilities as the universal standard for the human rights of all persons with disabilities that takes precedence over previous instruments. It is a binding treaty that will enter into force for States Parties on May 3, 2008, together with its Optional Protocol authorizing individual complaints, and it reflects the most recent consensus of the United Nations General Assembly on the subject matter of the human rights of persons with disabilities. As such, it is relevant as a guide to interpretation of other treaties and obligations under international law, all of which must be applied without discrimination based on disability.

There exist many disability-related declarations of the UN General Assembly, disability-related provisions in other UN General Assembly declarations, disability-related treaties or other instruments of regional organizations, disability-related provisions in other treaties or other instruments of regional organizations, general comments by treaty bodies and jurisprudence of regional courts bearing on disability issues. The provisions in these standard-setting documents demonstrate an evolution of the norms that have now found legal expression in the Convention on the Rights of Persons with Disabilities. In some cases, this evolution has benefited from the leadership of persons with disabilities to reject derogatory language and limitations on the exercise of rights that reflected the level of public awareness at the time earlier instruments were drafted. The Convention on the Rights of Persons with Disabilities represents a shift in the understanding of disability from a medical to a social model that recognizes the limitations created by a disability not as a problem of the person but rather a problem of barriers in society.

The United Nations Secretariat for the Convention on the Rights of Persons with Disabilities has called attention to criticisms of one earlier document, the “Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care,” and noted that the Convention now supersedes the earlier standards to the extent of any conflict. In this

paper, we aim to provide guidance on particular areas in which the Convention supersedes earlier standards contained in that document as well as others. It is a preliminary exploration and is not intended to be exhaustive.

Equal exercise of human rights

The principle of non-discrimination in the exercise and enjoyment of human rights is fundamental, and applies to all persons with disabilities.

The UN Declaration of Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care contains a general limitations clause that qualifies the exercise of all rights by persons labeled with mental illness, including rights guaranteed under the International Covenant on Civil Political Rights and the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture and other universally applicable human rights instruments. This is superseded by CRPD Article 4, in which governments "undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination", and is best understood as being void ab initio since it cannot be reconciled with general principles of non-discrimination and the universality of human rights.

Legal Capacity

Legal capacity is an inherent right that is fundamental to the dignity of persons with disabilities and the exercise and enjoyment of all other rights. Legal measures such as interdiction and guardianship that prevent persons with disabilities from acting on their own behalf must be replaced by provision of support that does not have the power to override a person's will but facilitates the exercise of autonomy, as provided by CRPD Article 12.

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities states that determinations of incapacity do not constitute discrimination. This is inconsistent with CRPD Article 12, which requires states parties to recognize that persons with disabilities "enjoy legal capacity on an equal basis with others, in all aspects of life."

The UN Declaration of Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care states that it is permissible to deprive an individual of legal capacity by reason of mental illness, and authorize a personal representative to make decisions in his or her place. This is superseded by CRPD Article 12, which furthermore requires governments to provide access to support in exercising legal capacity and establish safeguards to prevent abuse of such measures, in particular to ensure respect for the rights, will and preferences of the person.

The UN Standard Minimum Rules on the Treatment of Prisoners states that persons found to be "insane" should not be held in prison, but removed to a mental institution. To the extent this refers to insanity as a defense to imputability of a criminal offense, it is superseded by CRPD Article 12, which requires the recognition of legal capacity in all aspects of life, and is not limited to civil matters. (In doing away with the insanity defense, it is important to simultaneously abolish the death penalty and other harsh measures that have traditionally been avoided by means of this defense, at least by some defendants). The provision on

removing persons found to be "insane" to a mental institution is also superseded by Articles 14 and 19, which do not permit compulsory institutionalization based on disability.

Liberty

Liberty is a fundamental right that must be recognized and enforced without discrimination. When separate standards or procedures are used to deprive people with disabilities of their liberty (such as compulsory institutionalization or hospitalization) this violates the equal enjoyment of human rights. CRPD Articles 3, 14, 19 and 25 are relevant.

The European Convention on Human Rights states in Article 5.1(e) that "unsound mind" is a permissible ground for deprivation of liberty. This is inconsistent with CRPD Article 14, which requires states parties to ensure that "the existence of a disability shall in no case justify a deprivation of liberty" and by CRPD Article 19, which guarantees the right to live in the community and to choose where and with whom to live, on an equal basis with others.

Human Rights Committee General Comment No. 8 recognizes involuntary commitment to psychiatric institutions as a form of detention for which court control is required. While this was a useful advance at the time, it assumes that disability is a legitimate ground for deprivation of liberty, and this is inconsistent with CRPD Article 14. Rather than requiring court control of the detention, it should be considered unlawful per se.

The UN Declaration of Principles for the protection of Persons with Mental Illness and for the Improvement of Mental Health Care states that a person may be admitted involuntarily to a mental health facility if certain criteria are met. This is superseded by CRPD Article 14, as well as CRPD Article 25(d), which requires that health care be provided to persons with disabilities equally with others, "including on the basis of free and informed consent."

The UN Standard Minimum Rules on the Treatment of Prisoners states that prisoners with "mental diseases and abnormalities" must be placed in special institutions under medical management, and during their stay in prison must be under medical supervision. This is superseded by CRPD Articles 14 and 25(d). It also conflicts with Article 3, in particular the principle of "acceptance of persons with disabilities as part of human diversity and humanity".

Physical and mental integrity

People with disabilities have the right to refuse medical or other interventions that they consider harmful or do not want for any reason. It is a human right to preserve one's physical and mental integrity, irrespective of the opinions of medical professionals about the desirability of an intervention. Intentional interventions that disrespect this right may amount to torture or cruel, inhuman or degrading treatment or punishment. CRPD Articles 3, 12, 15, 16, 17 and 25 are relevant.

The European Court of Human Rights held in *Herczefalvy v. Austria* that forcible administration of mind-altering drugs cannot be torture or inhuman and degrading treatment if it is a "medical" or "therapeutic necessity," exercising some judicial oversight but deferring to medical authorities including their use of forcible measures on "patients who are entirely incapable of deciding for themselves." This holding is inconsistent with CRPD Articles 12,

15, 17 and 25(d). As noted above, Article 12 recognizes the right of all persons with disabilities to make their own decisions, and to have those decisions respected by others. This precludes the use of forcible means to carry out health care decisions contrary to the person's will. Article 15 obligates governments to protect persons with disabilities from torture and cruel, inhuman or degrading treatment, on an equal basis with others. There is growing evidence that nonconsensual administration of psychiatric drugs and procedures is a form of torture or cruel, inhuman or degrading treatment, which cannot exclude its application to persons with disabilities. Furthermore, Article 17 obligates governments to respect the physical and mental integrity of the person on an equal basis with others; and Article 25(d) requires that health care be provided to persons with disabilities equally as with others, including on the basis of free and informed consent. These two norms interrelate, as shown in the EU Charter of Fundamental Rights (not yet entered into force), Article 3, which highlights free and informed consent in the biological and medical contexts as an aspect of the right to respect for physical and mental integrity.

Human Rights Committee General Comment No. 20 states that the ICCPR Article 7 prohibition of torture applies to "patients in medical institutions," and also that "persons incapable of giving consent" and those under any form of detention may not be subjected to medical or scientific experimentation that may be detrimental to their health. This was an important step forward and remains valid, with the exception that protection against nonconsensual experimentation can no longer be premised on incapacity but needs to be addressed in a framework of supported decision-making and possibly stronger protections for all.

Committee on Economic, Social and Cultural Rights General Comment No. 14 states that coercive medical treatments may be applied for the treatment of mental illness. This is inconsistent with CRPD Article 25(d), which requires health care to be provided to persons with disabilities equally with others on the basis of free and informed consent.

The UN Declaration of Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care endorses numerous exceptions to the general principle that such care is to be provided on the basis of free and informed consent. This is superseded by CRPD Article 25(d) and by Article 12, which requires states to recognize that persons with disabilities enjoy legal capacity on an equal basis with others (and thus the right to personally exercise free and informed consent, rather than have it exercised on their behalf by a substitute decision-maker).

The UN Standard Minimum Rules on the Treatment of Prisoners allows for restraints to be used on prisoners "on medical grounds," which are not further described. To the extent this refers to medical labeling and management of prisoners based on disability, it is superseded by CRPD Articles 14, 15, 17 and 25(d).

Right to live in the community

The right to live in the community regardless of the degree of support a person needs is fundamental to inclusion and participation in society and necessary to the exercise of other rights.

The UN Declaration of Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care recognizes a right to live in the community but only "to the extent possible". No such limitation is envisioned by CRPD Article 19, which guarantees the right to live in the community with choices equal to those of others, including the right to choose where and with whom to live and the right to not be compelled to live in any particular living arrangement. The principle of "full and effective participation and inclusion in society" in CRPD Article 3 and the reference to people with disabilities who need more intensive support in CRPD preambular paragraph (j) reinforce the unequivocal nature of this right.

Braille

The only script that could be read by blind persons independently and with symbols of the language in question, which is applicable to all languages in the world, is Braille. The use of Braille is the only tool that allows blind persons to realize literacy skills on an equal basis with others.

The UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities refers to Braille only once, in Rule 5.6 among other means to give persons with visual impairments access to written information and documents. The CRPD mentions the need of recognizing Braille in several places, particularly in Articles 2, 9, 21 and 24, in language that stresses the use of Braille as the means of communication for blind persons and their social integration. The CRPD also goes further than the Rules with respect to audio, large print and ICT technology.

Education

Previous commitments such as the Declaration of Salamanca and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities moved towards guaranteeing education to children with disabilities. However, the CRPD clarifies previous documents and how the needs of different students are to be met. The CRPD stipulates that children with disabilities are not to be excluded from the general education system on the basis of disability; that they have the same right to free primary education and to secondary education on an equal basis with others, as well as a right to general tertiary education, vocational training, adult education and lifelong learning.

The CRPD further guarantees the right to be included and to receive the individual support required, within the general education system, to facilitate their effective education. However, the CRPD also requires that effective individualized support measures be provided in environments that maximize academic and social development, consistent with the goal of full inclusion. Among other things, this means: facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring; facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development. This means for deaf and blind children a learning environment where Sign language or Braille, the principles of bilingual education to Deaf students and learning

methods adapted to blind people, as well as teachers who use sign language, are part of the learning environment in a natural way; and a recognition of the need for supports for hard of hearing students with disabilities to be full participants in the learning environment which includes the need for assistive listening devices, captioning, a good acoustical environment, effective communication and instruction strategies and a welcoming attitude.

For deaf, blind and deafblind students, and in some cases for hard of hearing students as well, the option for separate learning environments must be understood as necessary to “maximize academic and social development”. The Standard Rules supported separate learning environments for these students under the rubric of “special education,” but “special education” also implied separation from the general educational system of the country and resulted in segregation and deprivation of the right to education for many students with disabilities. In contrast to this, CRPD Article 24 keeps all students within the general education system and allows for diverse ways of meeting their needs.

Other Issues

Other areas that have been suggested for further analysis where the CRPD may supersede earlier instruments are in relation to definition of disability; women with disabilities; children with disabilities; accessibility; habilitation and rehabilitation; and employment.

There are also areas where the Convention needs to be read in conjunction with previous instruments where they do not conflict, and earlier instruments may be more precise.

Sign language

The convention is highly relevant for Deaf persons as it recognizes sign languages as languages and considers them equal to spoken languages (Article 2) and guarantees a right to get professional sign language interpreters (Article 9). It also guarantees a right to interact in sign languages, to get information and to express oneself in sign languages, including in official interactions (Article 21b). Furthermore, it urges governments to recognize sign languages (Article 21e) and to facilitate the use of sign languages and learning in sign languages (Article 24.3b) as well as promote the linguistic identity and deaf culture of the Deaf community (Article 30.4).

In most cases the Convention on the Rights of Persons with Disabilities goes slightly further into details than the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993) or the Salamanca Statement and Framework for action on Special Needs Education (1994). However, in some cases the wording can be more precise in the Standard Rules than in the new Convention and therefore should be read together with the CRPD.

Rules 6.8 and 6.9 of the Standard Rules place importance on the education of children in a Sign Language environment and the need for education in their own groups. This is less clear in the CRPD.

Rule 5.7 of the Standard Rules states that sign language should be used in educating Deaf children in their families and communities. The CRPD does not mention that the family of a Deaf child should receive teaching in sign language. However, CRPD Article 24 on

Education is clearer than Rule 6 of the Standard Rules on learning sign languages and the right to use sign language at school.

The Salamanca Statement and Framework for Action on Special Needs Education also remains highly relevant for the teaching of Deaf children.

Conclusion

This summary has only addressed selected issues where international treaties or other instruments have spoken on the human rights of persons with disabilities, where there is a substantial discrepancy between the earlier instrument and the Convention on the Rights of Persons with Disabilities, or where the earlier instrument remains relevant to the concerns of persons with disabilities and does not conflict with the new obligations. It is a preliminary assessment and has not addressed every issue that might be included here. It also has not addressed the many areas where the Convention has developed in a positive way standards that already existed in the international human rights regime, or has clarified for the first time the specific obligations in a disability context. It is intended as a preliminary indication of areas where the international human rights regime needs to be aware of a shift in the relevant norms as a result of the new Convention. We hope it will be of assistance to those interested in how the Convention impacts on pre-existing standards and look forward to more comprehensive work on its full implications.

Appendix B – IDA Principles for Implementation of CRPD Article 12

IDA CRPD Forum

Principles for Implementation of CRPD Article 12

Introduction

Article 12 accords to people with disabilities recognition equal to others as full persons before the law. To be recognized as a full person before the law means that one's legal capacity, including the capacity to act, is equally recognized. Article 12 also imposes a positive duty on the state to establish support measures to ensure that the barriers to exercising legal capacity are removed and that the supports are in place for people with disabilities to fully enjoy and exercise this capacity. Insofar as present day national laws impose barriers to the exercise of legal capacity by persons with disabilities, or deny access to needed supports for the exercise of legal capacity, it is necessary for States in accordance with their obligation under article 4 (1) (b) to modify these laws to bring them in consonance with article 12. In order to assist States Parties in their law reform activity we have outlined the implications of article 12 below.

Overarching Principles

1. "Legal capacity" is best translated as the "capacity for rights and capacity to act".
2. "Legal capacity" for the purpose of the Convention on the Rights of Persons with Disabilities means both the capacity for rights and the capacity to act. This applies in the legal systems of all countries for all people, including those with disabilities.
3. The right to enjoy and exercise legal capacity applies equally to all people, including those with disabilities, irrespective of the nature or effects of their disability or apparent need for support. Legal capacity cannot be questioned or challenged based on disability.
4. People with disabilities who need support to exercise legal capacity have a right to be provided with such support. Support means the development of a relation and ways of working together, to make it possible for a person to express him or herself and communicate his or her wishes, under an agreement of trust and respect reflecting the person's wishes.
5. All people who have difficulty exercising their legal capacity can be accommodated within the support paradigm.
6. All adults, including those with disabilities, have an inalienable right to exercise their legal capacity. This means they cannot be prevented from doing something that they are otherwise permitted to do in the exercise of personal autonomy. They also have the corresponding duty to fulfill their responsibilities. Support and/or reasonable accommodation may be necessary to equalize the effective enjoyment of these rights and fulfillment of duties.

7. All children, including those with disabilities, have an evolving legal capacity, which at birth, begins with full capacity for rights, and evolves into full capacity to act in adulthood. Children with disabilities have the right to have their capacity recognized to the same extent as other children of the same age, and to be provided with age- and disability-appropriate supports to exercise their evolving legal capacity.
8. Parents and guardians have the right and responsibility to act in the best interests of their children while respecting the child's evolving legal capacity, and the state must intervene to protect the legal capacity and rights of children with disabilities if the parents do not do so, in accordance with the Convention on the Rights of the Child. The parents' or guardians' rights to act on behalf of their children cease when the child reaches the legal adult age. This must be the same for all persons to avoid classifying people with disabilities as children at an older age than others.

Building Legislative and Community Structures for Supported Decision Making

9. Governments are responsible for replacing existing substitute decision making laws and policies with supported decision making mechanisms that are recognized in legislation and have corresponding policies and programmes to effectively implement a system of supported decision making.
10. Governments are responsible for developing, supporting, promoting and offering support services, and for establishing safeguards to ensure a high quality of support and its compliance with standards such as: respect for the rights, will and preferences of the person, freedom from conflict of interest and undue influence, and being tailored to individual circumstances.
11. Support must not restrict the rights of the person or coerce the person to act in a particular way. Support must not affect his or her capacity to act. A person cannot be made to accept support against his or her will.
12. Different types of support should be promoted and encouraged to meet the wide range of needs among people with disabilities and allow for personal choice among different options. Types of support may include, for example, support networks, personal ombudsperson, community services, peer support, personal assistant, and advance planning. Age, gender, cultural and religious preferences, and similar factors must be taken into account, as well as needs expressed by people with different types of disabilities.
13. Interim measures may be needed when it is difficult to determine a person's wishes and it appears that the person may need support, or when support fails despite good efforts. In such cases, skilled supporters trained in establishing proper communication and the obligation to respect autonomy should be available to help. Governments should also promote advance planning for support that people may anticipate needing in the future.
14. A person may agree with his or her supporter(s) that the supporter(s) can make certain types of decisions, should the supporter be unable to determine the person's wishes at a particular time. This does not mean that the person loses his or her right to make those

decisions. The supporter is bound to keep making the effort to communicate and to follow the person's wishes as far as they may be known.

15. If no such authorization has been made and communication has failed despite good efforts, skilled supporters should continue trying to establish communication, while a decision is made that has the least possible effect in foreclosing opportunities for later revision.
16. Decisions that involve highly personal values and/or controversial measures that may violate a person's physical or mental integrity such as sterilization, cochlear implants, neuroleptic drugs, electroshock and psychosurgery, should not be permitted without the informed and affirmative consent of the person concerned.

Dismantling Substitute Decision Making Systems

17. Governments must act immediately to
 - a. recognize the equal rights of all persons to have and exercise legal capacity without discrimination based on disability;
 - b. establish a legislative, policy and financing basis for
 - i. provision of support in decision making in accordance with the principles outlined above; and
 - ii. the duty of all those in the public and private sectors to accommodate persons with disabilities who may require support in decision making; and
 - c. abolish
 - i. plenary guardianship;
 - ii. unlimited time-frames for exercise of guardianship;
 - iii. the legal status of guardianship as permitting any person to override the decisions of another;
 - iv. any individual guardianship arrangement upon a person's request to be released from it;
 - v. any substituted decision-making mechanism that overrides a person's own will, whether it is concerned with a single decision or a long-term arrangement; and
 - vi. any other substituted decision-making mechanisms, unless the person does not object, and there is a concomitant requirement to establish supports in a person's life so they can eventually exercise full legal capacity.
18. All laws and mechanisms by which a person's capacity to act can be deprived or restricted, based on differences in capabilities, must be abolished or replaced with laws that recognize the right to enjoy and exercise legal capacity. In addition to substituted decision-making mechanisms as mentioned above, this includes declarations of incapacity, interdiction, welfare orders, commitment to institutions, and compulsory hospitalization or medical treatment.
19. Similarly, any laws disqualifying a person from enjoying rights or performing legal acts or responsibilities based on disability must be abolished. For example, voting, holding public office, serving on juries, giving or refusing free and informed consent, inheriting or owning property, marriage and raising children, are rights guaranteed in the Convention that also involve an exercise of legal capacity. Support and/or appropriate

accommodation must be provided where necessary to exercise these rights and responsibilities. The signatures of people with disabilities are entitled to equal recognition as those of others.

20. In implementing Article 12, governments must address its implications for criminal responsibility and the criminal justice system. Persons with psychosocial disabilities have an equal legal capacity with others to be held responsible for wrongdoing, whether through a civil, criminal or other process, and to be provided with all needed supports and accommodations to ensure access to justice and conditions of punishment that respect human rights and dignity. The death penalty and similar harsh measures must be abolished to ensure humane treatment for all.
21. Implementation of all aspects of Article 12, including the development and provision of support, needs the active involvement and partnership of people with disabilities and the organizations they choose to represent their interests (in particular, organizations of people with disabilities controlled by themselves). All those who seek the protection of the Convention within an evolving concept of disability should be welcomed.

Appendix C – Gerard Quinn on Reservations/Declarations (Mexico October 2007)

National Human Rights Institutions of the Americas.

6th General Assembly

"The UN Convention on the Right of Persons with Disabilities

National Institutions as Key Catalysts of Change".

Gerard Quinn.

ICC Focal Point on Disability & Human Rights.

Mexico City, 25, 26 October 2007.

1. Introduction.

I thank the organisers and especially Human Rights Commission of Mexico for the honour of addressing you today.

I am a member of the Irish Human Rights Commission – a body set up as a result of the successful peace process on our island – and I am the ICC ‘focal point’ on disability for National Institutions.

The role of the ‘focal point’ is to stimulate common positions and raise the level of engagement of NIs on disability. So I am especially delighted to be here with so many NIs from around the Americas. As you know the Irish Human Rights Commission coordinates the activities of the European Group of NIs and bring you warm greetings from that Group. May I in passing pay warm tribute to the Canadian Human Rights Commission under its chair, Jennifer Lynch, for providing such excellent leadership to the ICC at a time when historic new opportunities are about to unfold for NIs at the UN Human Rights Council.

Regarding disability, this time period marks a historic threshold. The disability convention is now a reality. Various regions throughout the world are preparing for its implementation. I spoke in June at an EU Ministerial meeting on disability in Berlin and the Ministers have agreed to meet annually to compare notes and experience on implementation. We are doing our bit in Europe. So it is fitting that your Assembly would also reflect on the next steps.

National Institutions are given onerous responsibilities under the convention. I don’t think it is an exaggeration to say that the success of the convention in driving a process of change will depend in no small part on the level of enthusiasm and engagement of NIs.

And it’s good to be back in Mexico where it all started. The last time I was in Mexico was for the Mexican Government seminar on the convention in Summer 2002. The first Ad Hoc Committee had yet to meet and so the Mexican seminar promised to be – and was - quite foundational. At that meeting I recall working with Bengt Lindquist and others drafting Principles that should guide the work of the Ad Hoc Committee. Now, some five years on, I am glad to be back and especially glad that the work begun here in 2002 has led to the conclusion of a landmark convention.

The convention bears the imprint of Mexico. It is surely true that it would not have happened but for the political vision and impressive diplomatic dexterity of Mexico. May I in particular in passing pay particular tribute to the early work of Ambassador de Alba in the process which has brought great distinction to this country. And he has of course gone on to bring great credit to his country in the UN Human Rights Council.

2. Core Message of the Convention – a Revolution from Object to Subject.

If there is one core message from the convention it is that persons with disabilities should henceforth not be seen as objects to be managed but as human subjects deserving of equal respect and treatment. Henceforth we should not approach the disability sector from the perspective of human lacking and human need – rather we should approach it from the perspective of ensuring human flourishing and securing the blessings of liberty for all. The convention is the most eloquent refutation of paternalism I can imagine on the disability field.

This is philosophy, yes. But it is important philosophy since, as the Vienna Convention on the law of treaties expressly points out – a treaty is to be interpreted in light with its object and purpose. This will assume importance as treaty provisions are interpreted and applied and especially in the context of any reservations which will hopefully not happen.

But I am primarily here to talk about the role of National Human Rights Institution in making this treaty a reality.

As lawyers we often fall victim to the ‘temptation of elegance’ which is to assume that nice words mean real change. You don’t have to be a legal realist to see this is not true and in fact was never so. As Rene Cassin – one of the architects in chief of the European Human rights system once said:

“It would be deceiving the peoples of the world to let them think that a legal provision was all that was required...when in fact an entire social structure had to be changed.”

[Rene Cassin, quoted by Asia/Pacific Forum, *Disability Issues Paper*, September 2007]

While words may inspire and mobilise people, they will not, on their own, bring about change.

3. The Convention as a Driver of Domestic Change.

I view the UN convention as something that helps to **strengthen the political momentum** towards our common challenge of securing equal rights for persons with disabilities. This momentum exists in many regions and States albeit at varying levels of intensity. So the words of the convention sit with this process of change and help to keep it on course. Resting as it does on core human values such as dignity and autonomy, it provides a **clear moral compass** as we come to terms with the legacy of the past and try to create a more inclusive tomorrow. Words harbour values and accessing these values also gives coherent direction to the process of change.

And its status as an **internationally agreed binding legal instrument** raises the stakes and directly engages state responsibility as a matter of law and not just policy. So these words carry a special status.

In short the convention provides a road map. It enables the international community to judge whether sufficient progress has been made. It provides a language, a common conceptual framework. Look on the convention as initiating a worldwide process of reform in which you, as NIs, will play a major part. And by the way, to my mind, we are all developing countries when it comes to disability.

So, the whole point about the convention is to bring about change. The words must be tied to change. It follows that once ratified it should trigger a **sustained and dynamic programme of law reform – one that actively listens to persons with disabilities**. It is not enough to stand back and add it to a list of instruments already ratified. It has to have traction with the domestic processes of law reform.

As you are aware from the contribution of Michael Stein, the disability convention is the first human rights convention adopted in the 21st century. It was agreed in August 2006 and was

adopted by the UN General Assembly on December 13 in New York. Over 100 States have already signed the convention - including the European Commission.

A new UN Committee on the Human Rights of Persons with Disabilities will be established to assess periodic State reports on the progress they have made under the convention once sufficient ratifications are in. Just as important and indeed innovative, a Conference of States Parties will be set up under the treaty to enable the exchange of best practice.

The convention is accompanied by an optional Protocol – which is just that – optional. This Optional Protocol enables States to recognise the competence of the new UN Committee on the Rights of Persons with disabilities to lodge complaints and have them adjudicated upon. So when States ratify the convention they will also have the option to ratify the Optional Protocol allowing persons to bring complaints before the new UN Committee. That will mean, for example, that persons with intellectual disabilities may be able to bring complaints before the relevant body challenging, for example, the very existence of sheltered workshops and the terms and conditions of employment and treatment therein.

4. Avoiding a Patchwork of Rights and Obligations.

The impression thus far is attractive. At long last there will be a touchstone according to which change and reform should take place. It is axiomatic that there is a need to avoid any Balkanisation of the convention norms - the emergence of a patchwork quilt of rights and obligations.

In this regard you should, however, bear in mind that a possibility is expressly allowed for reservations under Article 46 provided they are 'not incompatible with the objects and purpose of the convention' which reflects current international law under Article 19 of the Vienna Convention on the Law of Treaties. There is, however a substantial and growing body of opinion to the effect that reservations should never be allowed in human rights instruments. The best exemplar of this is a book of essays by eminent jurists brought out by the Venice Commission of the Council of Europe last year.

I only mention this in passing because it remains to be seen whether States will enter reservations and, if so, what the process for determining compatibility will look like.

I note in passing that while Mexico has not entered a formal reservation it has made an 'interpretive declaration' when ratifying the convention. Let me remind you that Article 2.1.d of the Vienna Convention on the Law of Treaties defines a reservation as:

A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.

So a reservation is a serious matter. A multitude of reservations could undo the consensus achieved at the time of drafting a particular provision. And in any event, reservations should be avoided lest a treaty becomes a patchwork quilt of variable obligations depending on the state of domestic law at any particular point in time.

It bears repeating that the convention – any convention – is intended not merely to reflect reality on the ground **but to change it**. It assumes a lexical priority of its norms over domestic law. Reservations operate to reverse the normal flow of treaty norms and restores priority to domestic law. They put a brake on the process of reform the convention is supposed to set in train. So I am glad Mexico did not enter a formal reservation.

An 'interpretive declaration', according to Pellet is:

A unilateral declaration, however phrased or named, made by a State ...purporting to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.

To put the matter another way, while a reservation means that a State does not feel bound by a particular provision, an 'interpretive declaration' means that a State consents to be bound but puts forward a meaning its wishes to ascribe to one or other provisions in a treaty.

It is not my place to pass judgment on the 'interpretive declaration' of Mexico. But permit me to make a few observations in passing.

It is my understanding that the Mexican interpretive declaration goes to Article 12.2. which provides that States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others. The intent of Article 12 - restoring subjectivity to the person - sits at the very heart of the convention. It assumes capacity. It displaces the normal instinct of States which is to supplant capacity with more appropriate capacity-enhancing interventions (assist decision making). And it adds a web of safeguards.

I think it is fair to reflect – as one who participated in the drafting – that a reservation to Article 12.2. that took away from these core premises would indeed be inconsistent with the 'object and purpose' of the convention since Article 12.2. encapsulates the very essence of the convention. It goes to the heart of treating persons as subjects and not as objects.

And it is my understanding that the 'interpretive declaration' is to the effect that if there is a clash between Mexican law on the one hand and Article 12.2. on the other hand then the superior norm shall prevail. This of course begs the obvious question – which is superior?

If *arguendo* Mexican law is superior then the need for the interpretive declaration is not obvious since Article 4.4. of the convention is already to the effect that the norms of the convention are without prejudice to any higher national standard. So the 'interpretive declaration' - taken on its express terms - it would appear surplusage. And if, *arguendo*, the domestic norms are not up to the thresholds required by Article 12.2. then, taken on its express terms, the 'interpretive declaration' must give way to the 'superior' norms of the convention.

And it does look like an unusual 'interpretive declaration' in that it does not purport to attach any particular meaning or interpretation to Article 12 but instead operationalises a more mechanical principle of interpretation already dealt with under Article 4.

Of course there is always the possibility that the 'interpretive declaration' might be found by the new UN Committee to amount to a disguised reservation. If so, and if it indeed attempts to gut the heart of Article 12.2. at least with respect to the Mexican situation, then there

would seem to be an almost unanswerable argument that it is incompatible with the 'object and purpose' of the convention. These are big ifs and it is not easy to be categorical since the 'interpretive declaration'- taken on its express terms - seems merely to confirm the principle of interpretation in Article 4.

Let me also remind you that both reservations and declarations can be withdrawn at any time by a ratifying State. For the avoidance of doubt it might be wiser to reflect further on this 'interpretive declaration' and, if Article 4.4. is found to be sufficient to cover the point, to consider withdrawing the declaration.

So there will be much to keep the lawyers busy!

My larger point is that National Institutions need to be vigilant on the issue of reservations (including so-called 'disguised reservations') and declarations. We owe it to our own citizens. And just importantly we owe it to each other as NIs since a tear on the fabric at one end could lead to an unravelling of the thread at an other end.

5. Assumptions about the Process of Change

Getting back to the theme of the convention as a driver of change. A caveat must be entered. The pure ether of international law is often exquisitely detached from the raw edges of human experience. The plain truth is that change nearly always happens locally and at its own pace – or sometimes not at all.

While there has been a reform movement in the disability field around the world for the best part of two decades, it has been driven mainly by local considerations.

Now that there is a high level legal instrument at the international level on disability, the main challenge ahead is to harness it effectively to ensure that the reform process acquires more coherence and that it touches all countries in the world.

Getting a good dynamic of reform going at the domestic level is the most important priority. The convention is best seen, in my view, as an engine of law reform where it matters most, in Dublin, Beijing, Santiago and Mexico City. In order to do this – to let the fresh air of international law in to guide domestic law reform programmes - several background assumptions come into play and it is best to be honest about them from the start.

First, this assumes an organized and vocal civil society - one that can successfully articulate arguments for change based on the norms of the Convention. It is true that DPOs have advanced significantly since the drafting process on the convention began in New York. They now have to exercise the same dexterity of policy entrepreneurship much closer to home. It bears emphasising that Article 4.3 embodies the principle of 'nothing about us without us'. That is, DPO must be consulted and listened to when formulating national policies and laws. That means that DPOs themselves will have to step up their capacities to engage constructively with government. I think they are already there in most countries and are a rich source of knowledge and inspiration.

Secondly, it assumes a responsive democratic order - one that will take notice of the voices of persons with disabilities and the edicts of international law and respond appropriately. Sadly,

this is not the case in all parts of the world. In a way this democratic deficit serves to give added significance to the need to ensure that development aid is leveraged correctly. Therein lies the potential significance of World Bank leadership in the field.

Thirdly, to a certain extent, it assumes the existence of a rich tapestry of domestic bodies dedicated to identifying and advancing the public interest. Indeed, it further assumes that these bodies are sensitive to the voices of persons with disabilities. These bodies include an independent judiciary, law reform bodies and of course national human rights institutions.

In essence, embedding a self-sustaining process or dynamic of reform depends on getting a transmission belt flowing between the Convention and domestic circumstances. This is where our American friends say ‘the rubber hits the road’.

6. The Unique Role of NIs in the Process of change – Article 33.

National Institutions are given unique prominence in the convention as a constituent element in the process of domestic change.

Article 33 is almost unique in an international human rights instrument. It separates out what might be termed ‘implementation’ issues from general ‘monitoring’ issues. A *cordon sanitaire* is kept between the two.

Article 33 (1) envisages one or more ‘focal points’ within government relating to the ‘implementation’ of the Convention. Presumably, if there is to be a diversity of ‘focal points’, they should be structured along functional lines. At the same time Article 33 announces a preference of sorts for a ‘coordination’ mechanism within government to facilitate ‘joined up thinking’ with respect to disability. As the Asia Pacific Forum points out in its Disability Issues Paper of 2007, this serves many purposes including facilitating advocacy and growing expertise within government.

To simply add the Convention to the competency of a national human rights commission will not be enough to meet the requirements of Article 33 (1). Article 33.1. stands separate from Article 33.2.

And with respect to ‘monitoring’, Article 33 (2) innovates by requiring States to “maintain, strengthen designate or establish” a “framework” which may include “one or more independent mechanisms” in order to “promote, protect and monitor implementation.” The wording is interesting and suggestive.

In essence, it calls for a domestic “framework” that may include one or a plurality of independent mechanisms to perform the functions of ‘promoting, protecting and monitoring’ implementation. So conceivably, a plurality of such mechanisms might be engaged depending on the function to be performed and indeed as appropriate in federal states.

‘Promoting’ is presumably broad enough to encompass not merely traditional forms of awareness raising but also encouraging State ratification as well as the incorporation of the Convention into domestic incorporation. It may also stretch to the choice of nominee for the new treaty monitoring body.

‘Protecting’ presumably includes using whatever complaints mechanisms are available including judicial and administrative to vindicate the rights of persons with disabilities.

And ‘monitoring’ presumably refers to periodic assessments of progress achieved and obstacles encountered in the domestic implementation of the Convention. Authoritative assessments of the pace and degree of change are quite crucial in keeping a reform momentum going.

By the way, very few NIs have a developed experience in this field. This makes international co-operation all the more important and indeed vitally necessary. We have a lot to genuinely learn from one another. That is why the ICC endorsed an excellent proposal from the Asia/Pacific Forum to develop a database on rights and disability. Knowledge is power. Access to how other NIs approach common issues such as inclusive education and how they leverage their statutory powers to maximum effect could be a trigger in getting us to look at familiar issues in a new light. I will talk a greater length tomorrow about the proposal – and the vision behind it. Suffice it to say that NI engagement on the disability issue will be measurably enhanced by intelligent and strategic co-operation into the future.

Article 33 (2) also requires States to take into account “principles relating to the status and functioning of national institutions [NIs] for protection and promotion of human rights.” This is a thinly veiled reference to the Principles relating to the Status of National Institutions (Paris Principles), adopted by the United Nations General Assembly in 1993.

Article 33 (2) does not mean that the Principles apply to each and every component of the “framework”. But it would look strange - to say the least - if a core component of the “framework” lacked fidelity to the Principles or if they were ignored altogether. That is to say, the default setting lies in favour of National Institutions doing the heavy lifting with respect to the Article 33.3 tasks.

The Paris Principles set out the competence and responsibilities of NIs which include the responsibility to make recommendations with respect to the promotion and protection of human rights.

An important threshold point arises here. Given that the intention of the framers of the convention was not to create ‘new rights’ but to add clarity and specificity with respect to existing rights and obligations under international law in the specific context of disability - it follows that National Institutions do not have to wait for the convention to be ratified by their respective countries to become engaged on disability and rights issues. Indeed, there is already a wealth of experience in some NIs which is a resource for all NIs. The accumulated experience of the Canadian, Australian and New Zealand NIs is particularly instructive. Given that NIs can – and should – be engaged even before the adoption of the convention it also follows that their general obligation to make recommendations to Governments can and should already embrace disability.

The Paris Principles also deal with the composition of NIs which shall include a “pluralist representation” of social forces. To me this means that persons with disabilities with requisite expertise should be actively included on NIs. The Paris Principles also call for guarantees of independence both generally as well as with respect to methods of operation. Persons with disabilities need to be assured of this independence.

In keeping with the overall spirit of the Convention - which is an attitude of inclusion - Article 33 (3) takes the next logical step of requiring that civil society (and especially persons with disabilities themselves and their representative organizations) “shall be involved and participate fully in the monitoring process.”

Most UN treaty monitoring bodies look with disfavour upon States that do not involve civil society in the drafting of their periodic reports. This goes further. It explicitly requires such engagement with respect to national ‘monitoring’ which is quite crucial in keeping a domestic dynamic of reform going. As such, it reflects a general requirement with respect to the consultation of persons with disabilities in Article 4(3).

6. Conclusions.

So the picture that emerges from Article 33 is that of a window that lets in the fresh air of international law and that seeks to link up the norms of the Convention with a domestic process of change.

Firstly, it locks onto the existing institutional architecture of change within Government by engaging implementation bodies and seeking their coordination. This should give fresh impetus to change since one of the big problems in disability has been the ‘silo effect’ of individual Government departments going their separate (and irreconcilable) ways. By the way, the ‘silo’ effect is nearly universal and not particular to any one country.

Secondly, it engages independent mechanisms of “promotion, protection and monitoring” by trying to ensure that they take on the disability issue and mainstream it into their ongoing activities. This is an exciting role of NIs. It means we should not merely react to change but should ourselves help to shape that process – ‘shape shifters’.

Most importantly, it seeks to give voice to persons with disabilities in the vital task of monitoring the process change. I acknowledge the Seoul Declaration of a few weeks ago which call on NIs to become actively engaged and which also calls on civil society to become engaged as partners for change. This is exactly the right pitch. The slogan ‘nothing about us without us’ becomes even more important as dynamic processes of change are embedded domestically.

So Article 33 *triangulates* between executive efficiency in implementation, independent scrutiny through NIs, and active listening to the authentic voices of persons with disabilities. Unless this triangulation can be triggered into life at the domestic level, the Convention will remain only words.

And it will come as no surprise that I see NIs as a key change enabler in this process of change provided there is effective triangulation with civil society.

So I look on today as another step in the direction of getting NIs more actively engaged on the disability rights issue and I warmly thank you for the privilege of addressing you today.

Appendix D – Brief biographical note on David Webb

David Webb is a former Chair of the Victorian Mental Illness Awareness Council, the peak NGO for mental health consumers in Victoria, and has served on the Management Committee of the Victorian Mental Health Legal Centre. Until recently, he was a board member of the World Network of Users and Survivors of Psychiatry (WNUSP), which played a key role in the CRPD negotiations as a UN accredited international representative of people with psychosocial disabilities. WNUSP is a member of the International Disability Alliance.

David completed a PhD at Victoria University in 2006, which is believed to be the world's first PhD on the topic of suicide by someone who has attempted suicide. He maintains that rather than helping suicide reduction, current mental health laws around Australia actually contribute to the suicide toll. They also contribute to a growing underclass in Australia of impoverished, homeless, unemployed (unemployable), marginalised and powerless people who have lost their basic citizenship rights because of the widespread and often institutionalised discrimination against people who experience psychosocial disability in Australia. David shares the dream of the CRPD that these people will one day get the support they need and want rather than the interventions that others think they need.